Objectivity and Interpretation

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Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text.

Interpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text, and meaning the product of that interaction. It is an activity that affords a proper recognition of both the subjective and objective dimensions of human experience; and for that reason, has emerged in recent decades as an attractive method for studying all social activity.[1] The idea of a written text, the standard object of legal or literary interpretation, has been expanded to embrace social action and situations, which are sometimes called text-analogues. In one of the most significant works of this genre to date, Clifford Geertz's *Negara*, a nineteenth-century Balinese cremation ceremony is taken as "the text."[2]

Admittedly, to treat everything as a text might seem to trivialize

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1. *See* Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3 (1971); *see also* Taylor, *Understanding in Human Science*, 34 REV. METAPHYSICS 25 (1980).

2. C. GEERTZ, NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI (1980) [hereinafter cited as NEGARA]; *see also* C. GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in THE INTERPRETATION OF CULTURES 412 (1973).

the idea of a text, but the appeal of the interpretive analogy stems from the fact that interpretation accords a proper place for both the perspective of the scholar and the reality of the object being studied and from the fact that interpretation sees the task of explicating meaning as the most important and most basic intellectual endeavor. This appeal is considerable and, as a consequence, liberties have been taken with the notion of a text and interpretation is now accepted as central to disciplines that were once on the verge of surrendering to the so-called scientific ethos, such as politics and history (though interestingly, not economics—there the surrender to the pretense of science seems complete). The behaviorists or social scientists have hardly quit the field, but a new humanistic strand has emerged and, when pushed to define that strand, one would speak, above all, of interpretation.

To recover, then, an old and familiar idea, namely, that adjudication is a form of interpretation, would build bridges between law and the humanities and suggest a unity among man's many intellectual endeavors. A proper regard for the distinctive social function of adjudication, and for the conditions that limit the legitimate exercise of the judicial power, will require care in identifying the kinds of texts to be construed and the rules that govern the interpretive process; the judge is to read the legal text, not morality or public opinion, not, if you will, the moral or social texts. But the essential unity between law and the humanities would persist and the judge's vision would be enlarged.

A recognition of the interpretive dimensions of adjudication and the dynamic character of all interpretive activity and its capacity to relate constructively the subjective and objective will also deepen our understanding of law and in fact might even suggest how law is possible. It might enable us to come to terms with a new nihilism, one that doubts the legitimacy of adjudication—a nihilism that appears to me to be unwarranted and unsound, but that is gaining respectability and claiming an increasing number of important and respected legal scholars, particularly in constitutional law. They have turned their backs on adjudication and have begun a romance with politics.[3]

This new nihilism might acknowledge the characterization of adjudication as interpretation, but then would insist that the character-

3. *See, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Levinson, *Law as Literature*, 60 TEX. L. REV. (1982) (forthcoming); *see also* Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981). Following the 1980 national elections and the overwhelming victory of the Right, the affection for politics, which many thought belonged to elections, was conferred on the party caucus. *See, e.g.*, Walzer, *Democracy vs. Elections*, NEW REPUBLIC, Jan. 3 & 10, 1981, at 17.

ization is a sham. The nihilist would argue that for any text—particularly such a comprehensive text as the Constitution—there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power. In this regard the new nihilism is reminiscent of the legal realism of the early twentieth century. It too sought to unmask what was claimed to be the true nature of legal doctrine, particularly the doctrine that insulated laissez faire capitalism from the growth of the activist state and the reforms pressed by Progressives and the supporters of the New Deal. It saw law as a projection of the judge's values.

In the decades following the Second World War, particularly in the sixties, at the height of the Warren Court era, a new judicial doctrine arose to replace the doctrine that was associated with laissez faire capitalism and that was ultimately repudiated by the glorious revolution of 1937 and the constitutional victory of the New Deal. It embraced the role of the activist state and saw equality rather than liberty as the central constitutional value. Scholars turned to defending this new doctrine and in so doing sought to rehabilitate the idea of law in the face of the realist legacy.[4] They sought to show that *Brown v. Board of Education*[5] was law, not just politics. So were *Reynolds v. Sims*,[6] *New York Times v. Sullivan*,[7] and *Gideon v. Wainwright*.[8]

The nihilism of today is largely a reaction to this reconstructive effort of the sixties. It harks back to the realist movement of an earlier era, and coincides with a number of contemporary phenomena—the transfer of the judicial power from the Warren Court to another institution altogether; a social and political culture dominated by the privatization of all ends; and a new movement in literary criticism and maybe even in philosophy called deconstructionism, which expands the idea of text to embrace all the world and at the same time proclaims the freedom of the interpreter.[9]

4. *See* Ackerman, Book Review, DAEDALUS, Winter 1974, at 119 (reviewing J. FRANK, LAW AND THE MODERN MIND (1930)).

5. 347 U.S. 483 (1954).

6. 377 U.S. 533 (1964).

7. 376 U.S. 254 (1964).

8. 372 U.S. 335 (1963).

9. *See, e.g.*, H. BLOOM, P. DE MAN, J. DERRIDA, G. HARTMAN & J.H. MILLER, DECONSTRUCTION AND CRITICISM (1979). For a spirited review of this book, revealing the many strands within the deconstruction movement, see Donoghue, *Deconstructing Deconstruction* (Book Review), N.Y. REV. BOOKS, June 12, 1980, at 37. For the more philosophic aspirations of deconstructionism, see J. DERRIDA, OF GRAMMATOLOGY (G.C. Spivak trans. 1976).

I.

The nihilism of which I speak fastens on the objective aspiration of the law and sees this as a distinguishing feature of legal interpretation. The judge, the nihilist reminds us, seeks not just a plausible interpretation, but an objectively true one. Judges may not project their preferences or their views of what is right or wrong, or adopt those of the parties, or of the body politic, but rather must say what the Constitution requires. The issue is not whether school desegregation is good or bad, desirable or undesirable, to the judge, the parties, or the public, but whether it is mandated by the Constitution. The law aspires to objectivity, so the nihilist observes, but he concludes that the nature of the constitutional text makes this impossible. The text is capable of any number of possible meanings, and thus it is impossible to speak of one interpretation as true and the other false. It is impossible to speak of law with the objectivity required by the idea of justice.

The nihilist stresses two features of the legal text in explaining why objectivity is impossible. One is the use of general language. The Constitution does not, for example, contain a specific directive about the criteria for assigning students among the public schools, but provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." There is no further specification of what is meant by "state," "person," "jurisdiction," "protection," "laws," or most importantly, "equal." The potential of "equal" is staggering, and the nihilist is confounded by it. A second feature of the text is its comprehensiveness. The Constitution is a rich and varied text. It contains a multitude of values, some of which potentially conflict with others. It promises equality *and* liberty. In fact, at times it seems to contain almost every conceivable value, especially when one refers to such provisions as the privileges and immunities clause of article IV or the fourteenth amendment, or the provision of the ninth amendment that reserves to the people rights not otherwise enumerated in the Constitution.

In coming to terms with this nihilism, one must begin by acknowledging the generality and comprehensiveness of the constitutional text and also by insisting that in this regard the Constitution is no different from a poem or any legal instrument. Generality and comprehensiveness are features of any text. Though the Constitution may be more general and comprehend more than a sonnet or a contract, it is comparable in this regard to an epic poem or some national statutes. Few, if any, statutes touch as many activities as the

Constitution itself (which, after all, establishes the machinery of government) but many, if not most, embody conflicting values and are in that sense comprehensive. It should also be understood that generality and comprehensiveness do not discourage interpretation but are the very qualities that usually provoke it. Interpretation is a process of generating meaning, and one important (and very common) way of both understanding and expressing the meaning of a text is to render it specific and concrete.

There are some legal theorists who would limit legal interpretation to highly specific constitutional clauses. This school, misleadingly called "interpretivism," but more properly called "textual determinism," operates with a most arid and artificial conception of interpretation.[10] For an interpretivist only a specific text can be interpreted. Interpretation is thus confused with execution—the application of a determinate meaning to a situation—and is unproblematic only with regard to clauses like that requiring the President to be at least 35 years old. Most interpretivists, including Justice Black, would recognize the narrowness of such a perspective and want to acknowledge a role for less specific clauses, like freedom of speech; but in truth such provisions are hardly obvious in their meaning and require substantial judicial interpretation to be given their proper effect. Does "speech" embrace movies, flags, picketing, and campaign expenditures? What is meant by "freedom"? Does it, as Isaiah Berlin wondered, pertain exclusively to the absence of restraint, or does it also embrace an affirmative capacity for self-realization?[11]

To endorse active judicial interpretation of specific clauses and to caution against judicial interpretation of the more general and potentially more far-reaching clauses, such as due process and equal protection, represents an attempt at line-drawing that cannot itself be textually justified. It is instead motivated by a desire—resting on the most questionable of premises—to limit the role of constitutional values in American government and the role of the judiciary in expressing those values. And the line itself would be illogical. It would require that small effect be given to the comprehensive constitutional protections while full effect is given to the narrow ones. I reject this

10. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Professor Grey also understands interpretation in this narrow fashion. *See* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

11. I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969).

attempt at line-drawing because I reject the premises and the result, but it must be emphasized that, for purposes of this essay, the critical question is not whether judicial interpretation of specific clauses, understood in any realistic sense, is legitimate and that of general clauses is not, since, as we saw in the case of the first amendment, both require substantial interpretation. Rather the question is whether *any* judicial interpretation can achieve the measure of objectivity required by the idea of law.

Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained. To explain the source of constraint in the law, it is necessary to introduce two further concepts: One is the idea of disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged; the other is the idea of an interpretive community, which recognizes these rules as authoritative.

The idea of objective interpretation accommodates the creative role of the reader. It recognizes that the meaning of a text does not reside in the text, as an object might reside in physical space or as an element might be said to be present in a chemical compound, ready to be extracted if only one knows the correct process; it recognizes a role for the subjective. Indeed, interpretation is defined as the process by which the meaning of a text is understood and expressed, and the acts of understanding and expression necessarily entail strong personal elements. At the same time, the freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence), as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.

The disciplining rules may vary from text to text. The rules for the interpretation of a poem differ from those governing the interpretation of legal material; and even within the law, there may be different rules depending on the text—those for contractual interpretation vary from statutory interpretation, and both vary from those used in

constitutional interpretation. Though the particular content of disciplining rules varies, their function is the same. They constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged. These rules are not simply standards or principles held by individual judges, but instead constitute the institution (the profession) in which judges find themselves and through which they act. The disciplining rules operate similarly to the rules of language, which constrain the users of the language, furnish the standards for judging the uses of language, and constitute the language. The disciplining rules of the law may be understood, as my colleague Bruce Ackerman has suggested, as a professional grammar.

Rules are not rules unless they are authoritative, and that authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative. This means, above all else, that the objective quality of interpretation is bounded, limited, or relative.[12] It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules. The objectivity of the physical world may be more transcendent, less relativistic, though the Kuhnian tradition in the philosophy of science throws considerable doubt on that commonsense understanding;[13] but as revealed by the reference to language, and the analogy I have drawn between the rules of language and the disciplining rules of interpretation, the physical does not exhaust the claim of objectivity, nor does it make this bounded objectivity of interpretation a secondary or parasitic kind of objectivity. Bounded objectivity is the only kind of objectivity to which the law—or any interpretive activity—ever aspires and the only one about which we care.[14] To insist

12. The bounded or relativistic quality of the interpretive method is suggested by the idea of the hermeneutic circle, which denotes the parameters within which an interpretation achieves its validity and is based on the assumption that, at some point, an interpretation must make an intuitive appeal to common understandings. The idea of the hermeneutic circle is discussed in Taylor, *Interpretation and the Sciences of Man*, *supra* note 1, at 6–13, and vividly described by Geertz, NEGARA, *supra* note 2, at 103, as "a dialectical tacking." David Hoy draws a parallel between the idea of the hermeneutic circle and John Rawls' notion of reflective equilibrium. *See* Hoy, *Hermeneutics*, 47 SOC. RESEARCH 649, 666 (1980).

13. *See* T. KUHN, THE ESSENTIAL TENSION (1977); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed., enlarged 1970).

14. Taylor, *Understanding in Human Science*, *supra* note 1, at 33–37.

on more, to search for the brooding omnipresence in the sky,[15] is to create a false issue.

Nihilism is also fashionable in literary criticism today and is represented there by what I referred to as the deconstruction movement.[16] Deconstructionists exalt the creative and subjective dimension of interpretation. For them, interpretive freedom is absolute. Deconstructionists reject the idea of objectivity in interpretation, presumably even the bounded objectivity of which I speak, because they would deny that an interpretive community possesses the necessary authority to confer on the rules that might constrain the interpreter and constitute the standards of evaluation. Competing interpretive communities, and the freedom of the literary critics to leave one community and to join or establish another, are considered by the deconstructionists as inconsistent with the authoritativeness that rules need in order to constrain. Authority that depends completely on members' agreement is not authority at all.

I will not here attempt to dispute the notion that literary critics are so unconstrained that no claim of objectivity can be made for any of their interpretations, though my instinct is to be wary of this form of nihilism too.[17] For my purposes, it is sufficient to recognize the distinctive feature of legal interpretation: In law the interpretive community is a reality. It has authority to confer because membership does not depend on agreement. Judges do not belong to an interpretive community as a result of shared views about particular issues or interpretations, but belong by virtue of a commitment to uphold and advance the rule of law itself. They belong by virtue of their office. There can be many schools of literary interpretation, but as Jordan Flyer put it, in legal interpretation there is only one school and attendance is mandatory. All judges define themselves as mem-

15. The phrase belongs to Justice Holmes, Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1916) (dissenting opinion) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . ."), and is often used to mock the idea of objectivity.

16. *See* note 9 *supra* and accompanying text.

17. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980). Professor Fish acknowledges the creative relationship between reader and text, but sees the reader as a member of an interpretive community whose institutions shape or structure his view of the world. He argues that those who happen to share the same values and thus belong to the same interpretive community can judge the correctness of an interpretation, though the standards may change as the community does. The question for literature, however, is whether the interpretive community possesses the necessary authority to confer on what I have called the disciplining rules. For an illuminating review of this important book, see Graff, *Culture and Anarchy* (Book Review), NEW REPUBLIC, Feb. 14, 1981, at 36.

bers of this school and must do so in order to exercise the prerogatives of their office. Even if their personal commitment to the rule of law wavers, the rule continues to act on judges; even if the rule of law fails to persuade, it can coerce. Judges know that if they relinquish their membership in the interpretive community, or deny its authority, they lose their right to speak with the authority of the law.

Nothing I have said denies the possibility of disagreement in legal interpretation. Some disputes may be centered on the correct application of a rule of discipline. For example, a dispute may arise over a rule that requires the interpreter to look to history. Some may claim that the judge has misunderstood the history of the fourteenth amendment or that he is using a level of generality that is inappropriate for constitutional interpretation.[18] They may claim, for example, that the focus should not be on the existence of segregated schools in 1868 or on the willingness of those who drafted and adopted the fourteenth amendment to tolerate segregated schools, but on the framers' desire to eradicate the caste system and the implication of that desire for segregated education today. Disputes of this kind are commonplace, but they pose little threat to the legitimacy of the disciplining rules; they pose only issues of application.

Other disputes may arise, however, and they may involve a challenge to the very authority or existence of a rule. Some judges or lawyers may, for example, deny the relevance of history altogether in constitutional interpretation.[19] Disputes of this type pose a more serious challenge to the idea of objectivity than those over the application of a rule, for such disputes threaten the source of constraint itself. It should be remembered, however, that in the law there are procedures for resolving these disputes—for example, pronouncements by the highest court and perhaps even legislation and constitutional amendments. The presence of such procedures and a hierarchy of authority for resolving disputes that could potentially divide or destroy an interpretive community is one of the distinctive features of legal interpretation. One should also be careful not to exaggerate the impact of such disputes. The authority of a particular rule can be maintained even when it is disputed, provided the disagreement is not too pervasive; the integrity of an interpretive community can be preserved even in the face of a dispute or

18. Gunther, *Too Much a Battle With Straw Men?* (Book Review), Wall St. J., Nov. 25, 1977, at 4, col. 4 (reviewing R. BERGER, GOVERNMENT BY JUDICIARY (1977)).

19. *See generally* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

disagreement as to the authority of some particular disciplining rule. The legal community transcends cliques; some cliques may dissolve over time, others may come to dominate the community.

Just as objectivity is compatible with a measure of disagreement, it should also be stressed that objectivity is compatible with error: An objective interpretation is not necessarily a correct one. *Brown v. Board of Education* and *Plessy v. Ferguson*,[20] one condemning segregation, the other approving it, may both be objective and thus legitimate exercises of the judicial power, though only one is correct. To understand how this is possible, we must first recognize that legal interpretations can be evaluated from two perspectives, one internal, the other external.

From the internal perspective, the standards of evaluation are the disciplining rules themselves, and the authority of the interpretive community is fully acknowledged. The criticism, say, of *Plessy v. Ferguson* might be that the judges did not correctly understand the authoritative rules, or may have misapplied them; the judges may have failed to grasp the constitutional ideal of equality imported into the Constitution by the fourteenth amendment, or incorrectly assumed that the affront to blacks entailed in the Jim Crow system was self-imposed. Though such a criticism argues that the interpretation is mistaken, it might well acknowledge the objective character of the interpretation on the theory, borrowed from Wittgenstein,[21] that misunderstanding is a form of understanding, that a judge could misunderstand or misapply a rule and still be constrained by it. An objective but (legally) incorrect interpretation partakes of the impersonality or sense of constraint implied by the idea of law. Not every mistake in adjudication is an example of lawlessness.

The internal perspective permits another type of criticism in which both the objectivity and the correctness of the decision may be challenged. The charge may be that the judge utterly disregarded well-recognized disciplining rules, such as those requiring the judge to take account of the intention of the framers of the fourteenth amendment or those rules prohibiting the judge from being influenced by personal animosities or bias. If these are the bases of criticism of the judicial decision, and arguably they may have some relevance to *Plessy*, then the claim is that the interpretation is both wrong and non-objective. I imagine that it is also possible for an

20. 163 U.S. 537 (1896).

21. L. WITTGENSTEIN, ON CERTAINTY §§ 74, 156 (G. Anscombe & G. von Wright, eds.; D. Paul & G. Anscombe trans. 1969).

interpretation to be both non-objective and correct, as when a judge pretty much decides to do what he wishes, that is, once again utterly disregards the disciplining rules, and yet in this instance gives the text the same meaning—in a substantive sense—as would a fair and conscientious judge constrained by all the appropriate rules. Such a situation does not seem to be of great practical importance, but it once again illustrates the analytic distinction between objectivity and correctness, even from the wholly internal perspective. Both qualities arise from the very same rules: Objectivity speaks to the constraining force of the rules and whether the act of judging is constrained; correctness speaks to the content of the rules and whether the process of adjudication and the meaning produced by that process are fully in accord with that content. From the internal perspective, legitimacy largely turns on objectivity rather than correctness; judges are allowed to make some mistakes.

The internal perspective does not exhaust all evaluation of legal interpretation. Someone who stands outside of the interpretive community and thus disputes the authority of that community and its rules may provide another viewpoint. A criticism from this so-called external perspective might protest *Plessy* on the basis of some religious or ethical principle (e.g., denying the relevance of any racial distinction) or on the grounds of some theory of politics (e.g., condemning the decision because it will cause social unrest). In that instance, the evaluation is not in terms of the law; it matters not at all whether the decision is objective. It may be law, even good law, but it is wrong, whether morally, politically, or from a religious point of view.

The external critic may accept the pluralism implied by the adjectives "legal," "moral," "political," and "religious," each denoting different standards of judgment or different spheres of human activity. The external critic may be able to order his life in a way that acknowledges the validity of the legal judgment and that at the same time preserves the integrity of his view, based on non-legal standards, about the correctness of the decision. He may render unto the law that which is the law's. Conflict is not a necessity, but it does occur, as it did over the extension of slavery in the 1850s and over the legalization of abortion in the 1970s. The external critic will then have to establish priorities. He may move to amend the Constitution or engage in any number of lesser and more problematic strategies designed to alter the legal standards, such as packing the court or enacting statutes that curtail jurisdiction. Failing that, he remains

free to insist that the moral, religious, or political principle take precedence over the legal. He can disobey.

One of the remarkable features of the American legal system is that it permits such a broad range of responses to the external critic, and that over time—maybe in some instances over too much time—the legal system responds to this criticism. The law evolves. There is progress in the law. An equally remarkable feature of the American system is that the freedom of the external critic to deny the law, and to insist that his moral, religious, or political views take precedence over the legal interpretation, is a freedom that is not easily exercised. Endogenous change is always preferred, even in the realm of the wholly intellectual. The external critic struggles to work within the law, say, through amendments, appointments, or inducing the Supreme Court to recognize that it had made a mistake. An exercise of the freedom to deny the law, and to insist that his moral, religious, or political views take precedence, requires the critic to dispute the authority of the Constitution and the community that it defines, and that is a task not lightly engaged. The authority of the law is bounded, true, but as de Tocqueville recognized more than a century ago, in America those bounds are almost without limits.[22] The commitment to the rule of law is nearly universal.

II.

Viewing adjudication as interpretation helps to stop the slide toward nihilism. It makes law possible. We can find in this conceptualization a recognition of both the subjective and the objective—the important personal role played by the interpreter in the meaning-giving process, and yet the possibility of an inter-subjective meaning rooted in the idea of disciplining rules and of an interpretive community that both legitimates those rules and is defined by them. I have explained how objective interpretation becomes possible in the law, even if it is not possible in literature. But a number of other distinguishing features of adjudication remain to be considered: the prescriptive nature of the text, the claim of authoritativeness for the interpretation, and the desire for efficacy. These differences seem to deny the essential unity between the ways of the law and those of the humanities and may well cast doubt on my claim about the existence of constraint in the law. The question is whether we can insist that

22. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123–32 (London 1838).

adjudication is an interpretive activity and still find that it possesses an objective character in the face of these differences. I think we can.

A. *The Prescriptive Nature of the Text*

Legal texts are prescriptive. Though they presuppose a state of the world, and employ terms and concepts that are descriptive or representational, their purpose is not to describe, but to prescribe. For example, the statement in the fourteenth amendment that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws" is not meant to depict what is happening, much less what has happened, but to prescribe what should happen. It embodies a value—equality—and I see adjudication as the process by which that value, among others, is given concrete meaning and expression.

Adjudication and morality both aspire to prescribe norms of proper conduct. Both state the ideal. The ultimate authority for morality is some conception of the good. The ultimate authority for a judicial decree is the Constitution, for that text embodies public values and establishes the institutions through which those values are to be understood and expressed. When asked to justify why the schools of a community must be desegregated, reference will first be made to some lower court decision, then to a Supreme Court decision, and finally to the Constitution itself, for it is the source of both the value of equality and the authority of the judiciary to interpret that value.

The prescriptive element in adjudication and legal texts does not preclude objective interpretation. Prescriptive texts are as amenable to interpretation as descriptive ones. Those who might think otherwise would point to the profound and pervasive disagreement that often characterizes moral life—that people disagree about what is right and good, as, for example, whether the separate-but-equal doctrine is consistent with equality or whether the state should be allowed to interfere with the freedom of a woman to decide to have an abortion. The existence of this disagreement cannot be denied, but I fail to see why it precludes interpretation or is inconsistent with objectivity.

Interpretation does not require agreement or consensus, nor does the objective character of legal interpretation arise from agreement. What is being interpreted is a text, and the morality embodied in that text, not what individual people believe to be the good or right. An individual is, as I have already noted, morally free to dispute the claim of the public morality embodied in the Constitution and its

interpretation—he can become a renegade—but that possibility does not deny the existence or validity of either that morality or its interpretation. Neither the objectivity nor the correctness of *Brown v. Board of Education* depends on the unanimity of the justices, and much less on the willingness of the people—all the people, or most of the people—then or even now—to agree with that decision. The test is whether that decision is in accord with the authoritative disciplining rules. Short of a disagreement that denies the authority of the interpretive community and the force of the disciplining rules, agreement is irrelevant in determining whether a judge's decision is a proper interpretation of the law.

Moreover, though the celebration of disagreement in the realm of morality has become commonplace, it is far from clear that disagreement is more pervasive in the interpretation of prescriptive texts than descriptive or representational ones: Consensus as to the meaning of a play by Shakespeare, a novel by Joyce, or a historical text by Thucydides seems no more likely than it does in the interpretation of the Constitution. Consensus becomes possible in the interpretation of descriptive or representational texts only if we trivialize those texts (e.g., reduce them to statements like "There is a tree in my back yard."). That move is equally available in the treatment of prescriptive texts (e.g., "Equality is good."), though I see no value in insisting upon it.

The prescriptive nature of the text therefore should not be seen as a bar to objective interpretation, but it does have an important impact on the content of the disciplining rules, that is, the rules through which the law is defined. Legal interpreters are under constant pressure to abide by the constraints that govern moral judgments, for both law and morals seek to establish norms of proper behavior and attempt to describe the ideal by similar concepts, such as liberty and equality. Law borrows from morals (and, of course, morals from law). The borrowing is sometimes substantive; more often it is procedural.

Different schools of interpretation contemplate different degrees of borrowing. The natural law tradition, for example, demands that the judge give morality the decisive role in the interpretation of the legal text, or to put the same point somewhat differently, that the judge read the legal text in light of the moral text, the so-called "unwritten constitution."[23] In this instance the substantive borrowing

23. This tradition is explored in the articles of Professor Grey, referred to in note 10

would be most pronounced, but in fact the natural law tradition has never dominated American jurisprudence. That school has remained a clique. It has been largely overshadowed by legal positivism, which emphasizes the analytical distinction between law and morals, between what is legal and what is good. Legal positivism celebrates the "written constitution" and stresses factors like the use of particular words or the intent or beliefs of the framers, all of which have little or no moral relevance.

Positivism tries to separate law from morals, and keeps the substantive borrowing to a minimum, but as I suggested in my account of the so-called external criticism, and my depiction of the pressures forcing the external critic to work within the law, the separation will, in fact, never be complete. Two forces modulate the commitment to positivism and thus minimize the separation. The first derives from the fact that the judge is trying to give meaning and expression to public values (those that are embodied in a legal text) and that his understanding of such values—equality, liberty, property, due process, cruel and unusual punishment—is necessarily shaped by the prevailing morality. The moral text is a prism through which he understands the legal text. The second force relates to an intellectual dilemma of positivism: A too rigid insistence on positivism will inevitably bring into question the ultimate moral authority of the legal text—the justness of the Constitution.

Judges ardently committed to legal positivism will ultimately be asked—as they were in the debates over the constitutionality of slavery before the Civil War[24] and in response to the judicial efforts to protect industrial capitalism in the early part of the twentieth century[25]—to justify the public morality embodied in that text and the processes by which those values are expressed. Slavery may be protected by the Constitution; so may industrial capitalism and the inequality of wealth and privilege it invariably produces; but why must we respect the Constitution? The answer to such a question is not obvious or easily discovered, for one must transcend the text and the rules of interpretation to justify the authority of the text; to justify the Constitution itself or explain why the Constitution should be obeyed, one must move beyond law to political theory, if not religion.

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supra, and also in R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

24. *See* THE CONSTITUTION A PRO-SLAVERY COMPACT (W. Phillips ed. 2d ed., enlarged 1845) (W. Phillips ed. 1st ed. 1844) (The Anti-Slavery Examiner No. 11).

25. *See* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

Such questioning can itself become a moment of crisis in the life of a constitution, and since it is occasioned by a rigid insistence on the principles of positivism and the separation of law and morals, judges have an incentive to temper their commitment to that legal theory and thus to read the moral as well as the legal text. A judge quickly learns to read in a way that avoids crises.

An even more pronounced measure of borrowing occurs in formulating the disciplining rules that govern the procedures of legal interpretation. Above all, it is the procedures of morals that the law borrows.[26] One vision of the procedures of morals is conveyed by the vivid and powerful image created by John Rawls of the original position—of a group of people deliberating behind a veil of ignorance and reaching agreement on the principles of justice in a situation that entails divorcement from interests, a willingness to engage in rational dialogue, and a willingness to universalize the principles agreed upon.[27] Rawls was speaking of morals, but we can see in the law an insistence on an analogous set of procedural norms to discipline the interpreter: The judge must stand independent of the interests of the parties or even those of the body politic (the requirement of judicial independence); the judge must listen to grievances he might otherwise prefer not to hear (the concept of a nondiscretionary jurisdiction) and must listen to all who will be directly affected by his decision (the rules respecting parties); the judge must respond and assume personal responsibility for that decision (the tradition of the signed opinion); and the judge must justify his decision in terms that are universalizable (the neutral principles requirement). These rules reflect the inherently prescriptive character of the legal text and the identity of concepts used by law and morals to describe the ideal.

These procedural constraints are not, mind you, mere techniques of administration, to be dispensed with whenever the need or desire to do so arises. They are an essential component of the body of disciplining rules that govern the interpretive process known as adjudication and that constitute the standards for evaluating a legal interpretation. The correctness of any interpretation is relative to a set of standards, and in law those standards are composed of proce-

26. This is the essential insight of Professor Lon Fuller and his attempt to reformulate the natural law tradition in procedural terms. *See* L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

27. J. RAWLS, A THEORY OF JUSTICE (1971). A similar vision is found in Thomas Nagel's image of the individual struggling to stand outside himself and the world, as a way of achieving an objective perspective. *See* T. NAGEL, *Subjective and Objective*, in MORTAL QUESTIONS 196 (1979).

dural as well as substantive norms. This is partly due to the prescriptive nature of the text and the fact that the judge is trying to state the ideal, which has the effect of blending the idea of "correctness" into "justness": A just interpretation speaks to process as well as outcome. The role of procedure is also attributable, though perhaps in a secondary way, to certain institutional facts. The judiciary is a coordinate agency of government, always competing, at least intellectually, with other agencies for the right to establish the governing norms of the polity. The judiciary's claim is largely founded on its special competence to interpret a text such as the Constitution, and to render specific and concrete the public morality embodied in that text; that competence stems not from the personal qualities of those who are judges—judges are not assumed to have the wisdom of philosopher-kings—but rather from the procedures that limit the exercise of their power. It is as though they operate under the procedural constraints of the original position and from that fact obtain a measure of authority over the other branches.

B. *The Claim of Authoritativeness*

I have pictured the judge as an individual essentially engaged in interpretive activity. I have also suggested a moral dimension to legal interpretation—the judge interprets a prescriptive text and in so doing gives meaning and expression to the values embodied in that text. The judge seems to be a combination of literary critic and moral philosopher. But that is only part of the picture. The judge also speaks with the authority of the Pope.

Some literary critics aspire to a kind of authority: They search not just for a plausible interpretation, but for the correct interpretation of a text. The same is true for moral philosophers: They do not simply express what they believe to be good, but try to identify principles of morality that are objective and true. Both the literary critic and the moral philosopher aspire to a kind of authority we might term intellectual, an authority that comes from being right in their intellectual endeavor. Judges also attempt to achieve intellectual authority, yet this is only to supplement a powerful base of authority that they otherwise possess. Judicial interpretations are binding, whether or not they are correct. The decision of *Brown v. Board of Education* was not only right but had the force of law; *Plessy v. Ferguson* may have been wrong, from either the internal or external perspective, in 1896, as well as now, but it was nonetheless binding.

In what ways is the interpretation of the judge uniquely authori-

tative? There are two answers to this question. The first, emphasized in the work of John Austin,[28] is based on power: By virtue of the rules that govern their behavior, the officers of the state are entitled to use the power at their disposal to bring about compliance with judicial interpretations. Sometimes the power is brought to bear on the individual through contempt proceedings; sometimes through criminal prosecutions and police action; sometimes through supplemental civil proceedings. Sometimes, as with the desegregation of the public schools at Little Rock or the admission of James Meredith at Ole Miss, the power is expressed through brute force—bayonets, rifles, clubs, and tear gas.[29] A judicial interpretation is authoritative in the sense that it legitimates the use of force against those who refuse to accept or otherwise give effect to the meaning embodied in that interpretation.

The second sense of authoritativeness, suggested by the works of other positivists, namely Herbert Hart[30] and Hans Kelsen,[31] stresses not the use of state power, but an ethical claim to obedience—a claim that an individual has a moral duty to obey a judicial interpretation, not because of its particular intellectual authority (i.e., because it is a correct interpretation), but because the judge is part of an authority structure that is good to preserve. This version of the claim of authoritativeness speaks to the individual's conscience and derives from institutional virtue, rather than institutional power. It is the most important version of the claim of authoritativeness, because no society can heavily depend on force to secure compliance; it is also the most tenuous one. It vitally depends on a recognition of the value of judicial interpretation. Denying the worth of the Constitution, the place of constitutional values in the American system, or the judiciary's capacity to interpret the Constitution dissolves this particular claim to authoritativeness.

Belief in the institutional virtue of judicial interpretation may proceed from a variety of theories. One theory stresses the importance of having questions of public values settled with some finality through procedures unique to the judiciary. Another centers on the desirability of maintaining continuity with our traditional values and

28. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (London 1832); *see also* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

29. *See generally* BAYONETS IN THE STREETS (R. Higham ed. 1969). The history of the efforts to desegregate the University of Mississippi is also detailed in United States v. Barnett, 330 F.2d 369 (5th Cir. 1963).

30. H.L.A. HART, THE CONCEPT OF LAW (1961).

31. H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

sees adjudication as the process best designed to promote that end. A third theory emphasizes the need to maintain the stability of the larger political system and the role of the judiciary in maintaining that stability. Taken together, or maybe even separately, these theories have sufficient force, at least to my mind, to create a presumption in favor of the authoritativeness of judicial decisions. Any interpretation of a court, certainly that of the highest court, is prima facie authoritative. On the other hand, none of these theories, taken individually or collectively, can assure that this presumption will withstand a decision that many, operating from either the internal or external perspective, perceive to be fundamentally mistaken, an egregious error. In such a situation, the judge may be unable to ground his claim to obedience on a theory of virtue, but may have to assert the authoritativeness that proceeds from institutional power alone.

It is important to note that the claim of authoritativeness, whether it be predicated on virtue or power, is extrinsic to the process of interpretation. It does not arise from the act of interpretation itself and is sufficient to distinguish the judge from the literary critic or moral philosopher who must rely on intellectual authority alone. Moreover, though the claim of institutional authoritativeness is not logically inconsistent with objective interpretation, but rather presupposes it, the authoritative quality of legal interpretation introduces certain tensions into the interpretive process. It creates a strong critical environment; it provides unusually strong incentives to criticize and defend the correctness of the interpretation. Something practical and important turns on judicial interpretations. They are binding. Institutional authoritativeness also produces psychological strains in the interpreter. It at once oppresses and liberates the interpreter.

From one perspective, the claim of authoritativeness acts as a weight: It creates additional responsibility. The search for meaning is always arduous, but even more so when one realizes that the interpretation will become authoritative. *Brown* must have been agonizing. The justices had to determine what the ideal of racial equality meant and structure its relation to liberty. This task was hard enough, especially given the legacy of *Plessy v. Ferguson*, but the difficulty was compounded because the justices knew they were also establishing the course of the nation. They were authoritatively deciding whether more than one-third of the states could adhere to their long-established and passionately defended social order. Authoritativeness confers a responsibility that is awesome, probably at

times disabling. It appears that in at least one instance, when Justice Whittaker had to decide the reapportionment issue in *Baker v. Carr*,[32] this responsibility produced a nervous breakdown.[33]

The contrasting perspective is best captured by the work of Justice Douglas and a judicial quip that became popular in the mid-1960s, at the height of the Warren Court era: "With five votes we can do anything." From this perspective, the claim of authoritativeness liberates the judge, dangerously so; he works with the knowledge that his words will bind whether or not he has correctly interpreted the text. This sense of security is not completely well-founded, for, as we saw, insofar as the judge claims authoritativeness based on the virtue of the institution, the claim can be overcome or defeated by what others perceive to be a particularly serious mistake. Even from the perspective of power, the judge must recognize that a serious abuse of the judicial office may also incline the executive against using the force at its disposal to compel obedience. (Eisenhower's hesitation in deploying the federal troops in Little Rock is ample warning on that score.) But these limitations on the claim of authoritativeness depend on a complicated chain of reasoning and presuppose the most egregious of errors, and as such, only circumscribe the judge's sense of freedom. The larger fact is the freedom itself: An interpretation is binding even if mistaken. The judge enjoys a protection that is not shared by the literary critic or the moral philosopher, and that might allow a casual indifference to the integrity of the interpretive enterprise. The impact of the disciplining rules may be dulled. The search for meaning may be less than complete.

The mention of Justice Whittaker and Justice Douglas is not meant to suggest that each dimension of this conflicting dynamic finds expression in a different person. I assume that the psychological conflict resulting from the claim of authoritativeness is present in all judges, perhaps all the time. The existence of this conflict does not deny the interpretive character of judging, or make that task impossible to perform. The great judge—I have Earl Warren very much in mind—is someone who can modulate these tensions, someone whom the spectre of authority both disciplines and liberates, someone who can transcend the conflict.

32. 369 U.S. 186 (1962).

33. This is part of the folklore of the Supreme Court and thus found its way into B. WOODWARD & S. ARMSTRONG, THE BRETHREN 176 (1979).

C. *Efficacy and the Element of Instrumentalism*

The claim of authoritativeness, like the prescriptive nature of the text, complicates and defines the distinctive nature of legal interpretation. There is a third dimension that informs the task of the judge and that probably plays an even greater role in giving legal interpretation its distinctive cast: The judge tries to be efficacious. The judge seeks to interpret the legal text and then to transform social reality so that it comports with that interpretation.

The literary critic, no doubt, often finds himself anxious whether his audience will accept his interpretation as the true one, and he will polish his rhetorical skills and participate in institutional politics to that end. But the personal anxieties of the literary critic are raised to a duty in the law. The judge must give a remedy; it is part of the definition of his office. The duty of the Supreme Court in *Brown* was to interpret the ideal of racial equality in terms of concrete reality and to initiate a process that would transform that reality so that it comports with the ideal—to transform, as the slogan reads, the dual school systems into unitary, nonracial ones.

The authoritativeness of a legal interpretation is an essential ingredient of this transformational process. Faced with the Little Rock crisis, the Supreme Court felt compelled to reaffirm *Brown* and to put its authority on the line. But the reassertion of the authority of its interpretation, the achievement of *Cooper v. Aaron*,[34] did not itself desegregate the schools. Authoritativeness is a necessary, not a sufficient, condition of efficacy. Efficacy also requires measures that will transform social reality.

Part of that transformational process entails further specification of the meaning of the text, an explication of the ideal of racial equality in the context of a particular social setting: Does the commitment to racial equality allow freedom of choice as the method of student assignment in this particular city? Does it allow a neighborhood school plan? The answers to these questions depend in part on a specification of the imperatives of the ideal of racial equality and its relation to other constitutional ideals, such as liberty. In this regard, the transformational process also entails interpretation, with, so to speak, one eye on the Constitution and the other on the world—the world that was and the one that should be. But there is another dimension of the transformational process that is not properly consid-

34. 358 U.S. 1 (1958).

ered interpretive: instrumentalism. The judge must know how to achieve specific objectives in the real world.

The meaning the court gives the constitutional value, in the general and in the specific, defines and structures the end to be achieved by this transformational process. The objective established in *Brown* is to desegregate the schools. The question then becomes one of deciding how to achieve this objective, and in resolving that question the judge will have to make certain technical judgments: choosing the schools to be paired, designing bus routes, deciding which teachers are to be reassigned, adjusting the curriculum and sports schedule, etc. He may rely on the initiative of the parties and their so-called experts to help in these matters, but in the end, he will have to assume responsibility for the technical judgments—the judge must be an architect and engineer, redesigning and rebuilding social structures.

This is, however, only one facet of the instrumentalism. We also know, especially from the history of *Brown*, that a deeper and more intractable set of obstacles may confront the judge in his effort to give the value of racial equality a practical meaning: resistance by those who must cooperate in order for the meaning to become a reality—parents, children, teachers, administrators, citizens, and politicians. Collectively, and sometimes even individually, these people have the power to frustrate the remedial process. In ways that are both subtle and crude, they may refuse to recognize the authoritativeness of the judge's interpretation. They can boycott the schools, attack the minority students, withdraw from the public school system and flee to the suburbs or private schools, or refuse to appropriate money needed for buses.

In the face of this resistance, the judge can reassert his authority either by proclaiming the virtues of his office and the place of the judiciary in the political system, or by employing the power at his disposal. When the resistance is deep and sufficiently widespread, however, such an action is likely to be hollow and unavailing. Then the judge must be able to manage his opposition: He must transform resistance into cooperation. He must win the support of those he needs. He must bargain and negotiate. To succeed in achieving his remedial objectives, the judge must be as much a political strategist as he is a social architect and engineer.

This journey into instrumentalism, perhaps most vividly symbolized by the "all deliberate speed" formula of the second *Brown* deci-

sion,[35] may cause important departures from the interpretive paradigm, for the legal text cannot inform, in any important sense, the technical and strategic judgments that are an integral part of the remedial process. The Constitution establishes the values and establishes the institutions for expressing those values, but is not a significant source for understanding how those values might be effectively implemented. It is not a manual of the type Machiavelli might write. The judge can, of course, read another text, such as the one read by legislators—public opinion—but it is not an authoritative text for the judge. Moreover, there is no reason to assume that instrumental judgements should be or even could be constrained by the disciplining rules that characteristically govern judicial interpretation—for example, the rules assigning weight to precedent or requiring dialogue or independence of the judiciary from the political process. Indeed, it is not at all clear why the instrumental judgments are entrusted to the same officials who are charged with interpreting the constitutional text. At best, one can employ an argument of necessity—the instrumental judgments must be entrusted to the judge as a way of preserving the integrity of the meaning-giving enterprise, because the meaning of a value derives from its practical realization as well as its intellectual articulation.

The concern with efficacy may have even greater consequences. Instrumentalism may not only call for a departure from the interpretive paradigm, it may actually interfere with the interpretive process. It may make the judge settle for something less than what he perceives to be the correct interpretation. The technical and strategic obstacles to efficacy may humble the judge and remind him that even with five votes he cannot do everything, for they reveal the practical limits of his authority; but there is always the risk that the humility will be excessive. It may be crippling. Fearing he lacks the ability—the technical expertise or political power—to implement the right answer, and determined to avoid failure, even if it means doing nothing, the judge may tailor both the remedy and the right to what he perceives to be possible, and that may be considerably less than what he believes the text—the appropriate text—requires. That fear may drive the judge to read a lesser text—public opinion—or even worse, it might lead the judge to embrace what might be regarded as Frankfurter's axiom—it is better to succeed in doing nothing than to fail in doing something. Doubting that he has the ability to change

35. Brown v. Board of Educ., 349 U.S. 294 (1955).

social mores[36] or to implement desegregation plans that involve the suburbs as well as the city,[37] the judge may so modify his reading of the equal protection clause as to produce an interpretation of equality that tolerates separation.

The desire for efficacy may, as a result of this dynamic, corrupt, but it need not. The need to address complex social situations with creative and often complicated remedies and then to manipulate power so as to make them reality is undeniable, but these needs do not necessarily cause the judge to compromise the integrity of his interpretation. A secure concept of the judicial role, and the priorities within that role, and a proper recognition of the source of legitimacy, may enable the judge to order and perhaps even reconcile tasks that may otherwise tend to conflict. The core of adjudication, objective interpretation, can be protected from the pressures of instrumentalism, as it can be protected from the tensions produced by the claim of authoritativeness. The multiple demands of adjudication often make law an elusive, partly realized ideal, for they mean the judge must manage and synthesize a number of disparate and conflicting roles—literary critic, moral philosopher, religious authority, structural engineer, political strategist; but it would be wrong to abandon the ideal in the face of this challenge. The proper response is increased effort, clarity of vision and determination, not surrender.

III.

The nihilism that I have addressed is based on the premise that for any text there are any number of possible meanings and the interpreter creates a meaning by choosing one. I have accepted this premise, but have tried to deny the nihilism by showing why the freedom is not absolute. I have argued that legal interpretations are constrained by rules that derive their authority from an interpretive community that is itself held together by the commitment to the rule of law. There may, however, be a deeper nihilism that I have not yet addressed, and that also seems part of the present moment in American intellectual life.

For the deconstructionist, it makes little difference whether a text is viewed as holding all meanings or no meaning: Either brand of nihilism liberates the critic as meaning-creator. My defense of adjudication as objective interpretation, however, assumes that the Con-

36. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).
37. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

stitution has some meaning—more specifically, that the text embodies the fundamental public values of our society. I have confronted the nihilism that claims the Constitution means everything; but my defense does not work if the alternative version of the literary nihilism is embraced and applied to the law. My defense does not work if it is said that the Constitution has no meaning, for there is no theory of legitimacy that would allow judges to interpret texts that themselves mean nothing. The idea of adjudication requires that there exist constitutional values to interpret, just as much as it requires that there be constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power.

The roots of this alternative version of nihilism are not clear to me, but its significance is unmistakable. The great public text of modern America, the Constitution, would be drained of meaning. It would be debased. It would no longer be seen as embodying a public morality to be understood and expressed through rational processes like adjudication; it would be reduced to a mere instrument of political organization—distributing political power and establishing the modes by which that power will be exercised. Public values would be defined only as those held by the current winners in the processes prescribed by the Constitution; beyond that, there would be only individual morality, or even worse, only individual interests.

Against the nihilism that scoffs at the idea that the Constitution has any meaning, it is difficult to reason. The issue seems to be one of faith, intuition, or maybe just insight. This form of nihilism seems so thoroughly at odds with the most elemental reading of the text itself and with almost 200 years of constitutional history as to lead me to wonder whether anything can be said in response. On the other hand, I believe it imperative to respond, in word and in deed, for this nihilism calls into question the very point of constitutional adjudication; it threatens our social existence and the nature of public life as we know it in America; and it demeans our lives. It is the deepest and darkest of all nihilisms. It must be combated and can be, though perhaps only by affirming the truth of that which is being denied—the idea that the Constitution embodies a public morality and that a public life founded on that morality can be rich and inspiring.